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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-413

UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

NICHOLAS J. LARIONOFF, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Whether the respondents acquired a contractual entitlement under applicable statutes and regulations to the payment of variable reenlistment bonuses at the time they agreed to extend their enlistments in the United States Navy and thereby became bound to serve an additional two years on their enlistment contracts.

STATEMENT

Seven United States Navy enlisted men brought this class action to recover their variable reenlistment bonuses. In the event that payment of the bonuses was not granted, they sought rescission of the agreements extending their enlistments two years and honorable discharges upon completion of their initial four-year terms of service.

1. At the time the respondents enlisted in the Navy they were advised, either by their recruiters or by a classifier during recruit training, of the Navy's Advanced Electronic Field (AEF) Program. This program required that an enlisted man extend his initial four-year contract two additional years. In return, the plaintiffs were told they would receive advanced training in a certain "critical military skill" in the electronics field, rapid promotion, and a Variable Reenlistment Bonus (VRB) (App. 13-22).[1] The VRB was described to the respondents as a bonus paid at the end of the initial four-year enlistment in consideration for the two-year extension *(id)*. The bonuses being paid in the AEF field at that time were the highest allowed, and each of the respondents was advised of this fact. At no time, however, when they were considering entering the AEF program, were they told that the VRB was subject to change by administrative regulation or congressional legislation.

[1]Upon completion of their specialized training, the respondents were guaranteed automatic advancement in rank and pay grade. Navy BUPERS Instruction 1430.14C (Aug. 30, 1968). The VRB was to be paid the respondents when they began serving their extension. In addition to the VRB, a Regular Reenlistment Bonus (RRB) was paid to those who reenlisted for the first time within three months after their discharge or release date. Act of September 7, 1962, Pub. L. No. 87-649, 76 Stat. 467 (Pet. App. 82a-85a), *superseded by*, Armed Forces Enlisted Bonus Revision Act of 1974, Pub. L. No. 93-277, 88 Stat. 119 (Pet. App. 85a-89a).

All of the respondents made the decision to enter the program either at the time of their original enlistment or during their recruit training.[2] In addition to the normal enlistment contract they also executed an "Agreement to Extend Enlistment." Typical of all agreements was that signed by respondent Larionoff which read in pertinent part (*id.* at 157):

> I[,] NICHOLAS JOHN LARIONOFF JR., * * * having enlisted in the Navy of the United States on 23 JUN 69 for FOUR years, in consideration of the pay, allowances, and benefits which will accrue to me during the continuances of my service, voluntarily agree to extend my enlistment as authorized by Section 5539, of Title 10, United States Code,[3] and the regulations issued pursuant thereto. I voluntarily agree to extend my enlistment for a period of TWO years from the date of expiration thereof, subject to the provisions and obligations of my said contract of enlistment of which this, my voluntary agreement, shall form a part.
>
> REASON FOR EXTENSION: "Training (Advanced Electronics Field (AEF) Program * * *). I

[2]John Clay Smith enlisted in the Navy on October 1, 1968, and executed his extension agreement on October 15, 1968; Paul E. Boudreau enlisted on January 3, 1969, and executed his extension agreement on January 31, 1969; Joseph R. Tomaino enlisted on March 28, 1969, and executed his agreement on April 14, 1969; Nicholas J. Larionoff, Jr. enlisted on June 23, 1969, and executed his extension agreement on July 9, 1969; Thomas W. Dietz enlisted on September 3, 1969, and executed his extension agreement on September 26, 1969; Johnnie S. Johnson enlisted and executed his extension agreement on August 28, 1970; Lawrence E. White enlisted on March 13, 1969, entered the AEF program on April 1, 1969, and executed his extension agreement on July 23, 1969 (App. 30-35).

[3]Repealed by Act of January 2, 1968, Pub. L. No. 90-235, 81 Stat. 756, § 2(a)(3) (codified in 10 U.S.C. § 509 (Pet. Add. 44) and 37 U.S.C. § 906 (Pet. App. 89a)).

understand this extension agreement becomes binding upon execution and thereafter may not be cancelled except as set forth in BUPERS Manual, Article C-1407."[4]

* * * *

SUBSCRIBED and sworn to * * * this 9th day of JULY 1969 and this contract is hereby perfected and accepted for and on behalf of the United States. Service thereunder to begin from the date following the date the original contract of enlistment would have expired had it not been extended. This is the FIRST extension of current enlistment.[5]

As stated in the agreement, in consideration of the extension the respondents would receive "pay, allowances, and benefits." The government has conceded that the term "pay" in the agreement includes variable bonuses (Pet. App. 18a n.23, 56a n.2).

Upon completion of this advanced AEF training, the respondents were advanced to the rank of petty officer third class in the CTM rating and were advanced in pay grade from E-3 to E-4 (App. 30-35). At this time they also signed a standard service record entry acknowledging that they had in fact received the advanced training and had been advanced in pay grade.[6]

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[4]Navy BUPERS Manual, Art. C-1407, is set forth at App. 138-45. This article has been superseded by Navy BUPERS Manual, Art. 1050150 (Pet. Add. 94-103).

[5]In addition to executing the extension agreements, the respondents and other class members signed documents requesting assignment to the AEF program and acknowledging their two-year extension (App. 30-35).

[6]The document executed by respondent Larionoff, which was typical of those executed by all other class members, reads in pertinent part:

> I understand and agree that upon my being advanced to pay grade E-4 in accordance with BUPERSINST 1430.14

[footnote continued]

On March 23, 1972, subsequent to the time the respondents signed their extension agreements but prior to the expiration of their initial four-year enlistment, the Navy published a revised instruction on the VRB program.[7] This instruction deleted the CTM rate from the list of "critical military skills" effective July 1, 1972. After their initial four-years had been served, the respondents were required to sign their extension agreements. At this point they inquired about the payment of their variable bonuses, but they were informed that their rate had been deleted from the VRB list and they were entitled to receive only the Regular Reenlistment Bonus. Petitioner White refused to sign the extension agreement when he learned that he was not entitled to the anticipated award (*id.* at 21, 26). He was informed that his signature was not necessary because he was bound by the original extension agreement which he had signed nearly four years earlier (*id.* at 21).

Having failed to achieve a positive result through Navy channels, the respondents sought to remedy their predicament through their elected officials (*id.* at 173). The Navy's response to congressional inquiry was that while the CTM rate had been at critically low levels and eligible for the variable bonus when the respondents

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> series, that page 1A ["Agreement to Extend Enlistment"] date 09 JUL 69, which was executed for the purpose of AEF Program, will become binding and will serve to fulfill the obligated service requirements for automatic advancement. I understand that any future cancellation of obligated service requirements for the purpose of AEF Program will not serve as reason for cancellation of page 1A dated 09 JUL 69 except as set forth in BUPERSMAN 1050300.

(Pet. App. 6a n.7).

[7]Navy BUPERS Instruction 1133.18E (March 23, 1972) (App. 110).

agreed to extend their enlistments, a subsequent review of manning levels dictated that the VRB be discontinued prior to that point at which the respondents began to serve their extension (*id.* at 172). With no other administrative remedy available, the respondents filed suit in the District Court for the District of Columbia.

2. The primary purpose in initiating the VRB program was "attaining and sustaining adequate career manning levels in designated military specialties."[8] While Congress set upper limits on the amounts that could be paid in bonuses, implementation of the program was left to the discretion of the Secretary of Defense. 37 U.S.C. §308(g) (superseded).[9] The Secretary of Defense, in turn, after establishing the policies to be achieved, the general method of achieving them, and the criteria to be examined in establishing a variable bonus system, delegated the administration of the program to the respective Secretaries of the services.[10] It was stressed that the key to the success of the program was inducing service members to serve beyond their initial four-year enlistment,[11] because it would be less costly to pay the VRB to a reenlistee than to completely retrain another individual. In line with this, one of the criteria to be used in determining which rates were to receive the variable bonus was "the training investment required in the military specialty."[12] A highly publicized campaign on

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[8]DOD Directive 1304.14, para. IV.A (September 3, 1970) (App. 40).

[9]37 U.S.C. § 308(g), *superseded by*, Armed Forces Enlisted Personnel Bonus Revision Act of 1974, Pub. L. No. 93-277, 88 Stat. 119 (codified in 37 U.S.C. § 308(a) (Pet. App. 85a-89a).

[10]DOD Directive 1304.14, para. IV.B and V.A. (App. 40-41, 50-51).

[11]*Id.* para. IV.A. (App. 40).

[12]*Id.* para. IV.D.1. (App. 42-43).

the VRB was to be conducted by the Secretaries of the services, and a special attempt was to be directed at increasing the number of people volunteering for these critical skills.[13]

Each service was instructed to regularly review their respective bonus programs to determine to what extent the bonuses paid to certain rates should be reduced or terminated. When a bonus was reduced or terminated, an enlisted man would receive the award effective on the date of his reenlistment or extension of enlistment.[14] A member could attain eligibility through modification of an existing service obligation if such modification was accomplished prior to the time when the party approving the modification was notified of the prospective change in bonus.[15]

Pursuant to the Department of Defense directives, the Navy published instructions applicable to its award system.[16] This instruction listed several eligibility criteria that an individual had to meet before he actually received the VRB payment. The member was required to be eligible for continuous service reenlistment or extension of enlistment, be eligible for his first Regular Reenlistment Bonus, have attained a certain rank in the critical skill, have served at least 21 months not including schooling, reenlist for a period which when combined with time already in service would not exceed 69 months, and, finally, have attained eligibility prior to the date when the variable bonus was changed or terminated.[17]

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[13]*Id.* para. V.A.5 (App. 51).

[14]DOD Instruction 1304.15, para. VI.A. (Sept. 9, 1970) (App. 64).

[15]*Id.* para. V.B.1.f. (App. 61).

[16]Navy BUPERS Instruction 1133.18B (December 19, 1968) (App. 92-109). Each of the respondents agreed to extend their enlistments subsequent to the effective date of this instruction.

[17]*Id.* para. 6 (App. 97).

3. Based on this statutory and regulatory framework, the respondents filed suit in the district court under the Tucker Act, 28 U.S.C. § 1346(a)(2). It was the respondents' contention that the Navy's failure to pay them their variable bonuses was a breach of their contractual relationship (App. 7-12). On cross-motions for summary judgment, the court held that the class was proper under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure[18] and ruled in favor of the respondents.

In the district court's opinion, the issue was solely contractual. The VRB had been an inducement to the respondents to extend their enlistments two years. Since they had committed themselves to an additional two years in a rate in which the Navy was then paying a bonus, and since they were bound to the extension agreement at the moment it was executed, the Court ruled that mutuality of agreement required that the Navy should also be bound (Pet. App. 73a-74a). Relying on a "cardinal rule of contract law," the district court maintained that the contract should be analyzed "in light of the situation and relationship of the parties, the circumstances surrounding them *at the time of the contract*, and the nature of the subject-matter and the apparent purpose of the contract" (*id.* at 74a) (emphasis in original). If the Government did not want to commit itself to payment of the VRB to the respondents, the

[18]In its order the Court defined the class as

> Those enlisted Navy personnel who had (or earned after entering a special training program) a critical military skill, who signed their first term reenlistment contract when the critical military skill was eligible for a Variable Reenlistment Bonus (VRB), but who were denied the VRB because their reenlistment began to run after the suspension of the VRB on July 1, 1972. . . .

(Pet. App. 80a-81a).

district court stated that they should have made this clear in the contract. Finally, the court held that because the contract was written by the Government it would be construed most strongly against them (*id.* at 75a).[19]

In the interim between the district court decision and the Government's appeal, Congress passed the Armed Forces Enlisted Bonus Revision Act of 1974.[20] This Act eliminated the Regular and Variable Reenlistment Bonuses and substituted in their place a Selective Reenlistment Bonus (SRB). Although the Act protected those enlisted personnel subsequently eligible for a Regular Reenlistment Bonus, there was no saving clause protecting the variable Reenlistment Bonus.[21] Of the respondents, only respondent Johnson completed his initial four-year enlistment after the enactment of the Bonus Revision Act.[22]

4. The district court's decision was affirmed by the District of Columbia Circuit Court of Appeals on February 17, 1976 (Pet. App. 1a-50a). The court of appeals, however, viewed the issue in a somewhat different light than the district court. Since "[a] soldier's entitlement to pay is dependent upon statutory right," the respondents' contract theory would be interpreted with regard to applicable military regulations (*id.* at 10a n.15, *quoting Bell v. United States*, 366 U.S. 393, 401

[19]The district court also substantially reduced the request by the respondents' attorney for attorneys' fees in accordance with the standards of Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973) (Pet. App. 76a-79a).

[20]Pub. L. No. 93-277, 88 Stat. 119 (codified in 37 U.S.C. §§ 308, 308a) (Pet. App. 85a-89a).

[21]Pub. L. No. 93-277, § 3.

[22]Respondent Johnson's two-year extension began on August 28, 1974. (App. 33).

(1961)). The court ruled that under the applicable military regulations the variable bonuses were part of the "consideration" for which the respondents had extended their enlistments (Pet. App. 10a).[23]

After a review of the legislative history of the Act establishing the VRB, the court concluded that Congress had intended that the bonus be "brought to the attention of enlisted personnel at the point in time when they are choosing whether and how long to continue military service" (*id.* at 16a, *citing* 111 Cong. Rec. 17201 (1965)). Because Congress had delegated the implementation and regulation of the VRB program to the Department of Defense, the court then focused on the pertinent regulations and the Government's contention that a service member did not become eligible to receive the award until he actually began serving his extension. At first glance, the court felt, the regulation dealing with the reduction or termination of variable bonuses might support the government's position. However, it ruled that the language in this directive was, at best, ambiguous (Pet. App. 19a, *citing* DOD Directive 1304.14, para. IV.F. (September 3, 1970)). The court suggested that the regulation providing that an enlisted man will receive the award effective on the date of his reenlistment or extension of enlistment might require payment to the respondents. (Pet. App. 19a n.25, *citing* DOD Instruction

[23]The respondents' case on appeal had rested on two theories: first, that the payment of the VRB was part of the "pay, allowances, and benefits" which were due them in consideration of their extension; and, second, that because they had relied to their detriment on the government's oral representations concerning the VRB, the government was promissorily estopped from denying them their bonuses. Since the court's decision rested on the former theory, it found it unnecessary to discuss the latter. (Pet. App. 9a-10a).

1304.15, para. VI.A. (Sept. 9, 1970)).[24] Even if this were not the case, an exception to this clause, which said that an enlisted member would be eligible for the award in effect when his eligibility was "attained through any modification of service obligation," mandated payment. (Pet. App. 20a-21a).[25]

These interpretations led the court of appeals to the conclusion that the variable bonus due the respondents was that bonus in effect the day that the respondents signed their extension of enlistment agreements. The Government's position was viewed as being inconsistent with legislative intent that a specific sum be offered to enlisted men with critical skills (*id.* at 23a). If the Navy's interpretation of the regulation were correct, the enlisted member in a critical rating would be forced to gamble at the time he agreed to extend his enlistment on what award would be applicable on the date he began serving his extension (*id.* at 23a-24a). Finally, the court of appeals "reinforced" its conclusion by ruling that ambiguous terms in the contract would be construed most strongly against the drafter of the agreement (*id.* at 25a).[26]

[24]The court felt that "extension of enlistment" was ambiguous and could just as easily be read to mean the date on which the extension agreement was signed.

[25]The applicable Navy regulation included an extension of enlistment as a "modification of an existing service obligation." (Pet. App. 20a-21a, *quoting* Navy BUPERS Instruction 1133.18E, para. 7.h. (March 23, 1972)).

[26]As the district court had ruled, the appeals court held that the government could have inserted a clause in the extension contract stating that the award to be paid would be that in effect on the date that the member began to serve his extension. Had such a clause been in the contract, it was the court's opinion that there would have been fewer extensions. (Pet. App. 24a, *citing* Affidavit of Thomas W. Dietz (April 20, 1973)).

Because of respondent Johnson's unique position, the court specifically addressed his contractual relationship with the Government in view of the Bonus Revision Act. Noting that contractual rights against the Government are protected by the fifth amendment, the court ruled that "Congressional power to abrogate existing government contracts is narrowly circumscribed" (*id.* at 29a, *citing Perry v. United States*, 294 U.S. 330 (1935); *Lynch v. United States*, 292 U.S. 571 (1934)). Since the legislative history of the Bonus Revision Act indicated that the primary concern of Congress was reducing expenditures, the court relied on *Lynch v. United States*, *supra*, which held that "Congress is without power to *reduce expenditures* by abrogating contractual obligations of the United States" (Pet. App. 29a, *quoting Lynch v. United States*, *supra*, at 580) (emphasis in original). The court acknowledged the opposite conclusion reached by the Fourth Circuit on this issue in *Carini v. United States*, 528 F.2d 738 (9th Cir. 1975), *petition for cert. pending* (No. 75-1695); but disagreed. The issue, as phrased by the Court in its denial of the Government's petition for rehearing, was "not whether the VRB can under some circumstances be considered a gratuity, but whether it ripened to a contract under the circumstances in the record" (Pet. App. 56a). The court distinguished the Government's example of social security as an instance where Congress could change the amount of money paid. Social security involved a "noncontractual right;" (*id.* at 56a n.3) but in this instance there was a contract between the parties, and the respondents had promised to spend an additional two years in the Navy in return for the VRB (*id.* at 60a). Agreeing with the government that as far as the amount of regular pay, statutory changes were acceptable, the court cited legislative intent that under

the variable bonus program, the member should be paid a specific sum not subject to future change (*id.* at 61a).[27]

SUMMARY OF ARGUMENT

The question presented by this case is whether the respondents acquired an entitlement to the payment of variable reenlistment bonuses at the time they agreed to extend their enlistment an additional five years. The court of appeals recognized that under *Bell v. United States*, 366 U.S. 393, 401 (1961), "[a] soldier's entitlement is dependent upon statutory right." Therefore, the respondent's contract theory was, in the court of appeals' opinion, primarily dependent upon the court's interpretation of the pertinent legislation and military regulations.

Although the Secretary of the Navy was delegated the responsibility of administering the Navy's VRB program, the Government's interpretation of the applicable regulations is, as the court of appeals noted, in conflict with the legislative intent behind the VRB program and undermines the explicit language of the appropriate Department of Defense regulations. The court of appeals correctly viewed the issue as whether, under these regulations, the "pay, allowances, and benefits" for which the respondents agreed to extend their enlistments included the VRB in effect at that time.

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[27] In other issues before the court on appeal, the respondents were denied rescission of the extension contract because they had an adequate remedy at law (Pet. App. 31a-33a). It was ruled that the class was properly certified under Rule 23(b)(1)(B) F.R. Civ. P. and that prejudgment notice was not required (*id.* at 33a-49a). Finally, the district court's application of Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973), to the issue of attorneys' fees was affirmed, but that aspect of the lower court's decision was remanded for an award determination for counsel's efforts on appeal (*id.* 49a-50a).

It was the design of Congress that the bonus be offered as an incentive toward a Navy career at that point when the enlisted man was deciding how long to remain in the military service. In line with this, the respondents became entitled to receive the variable bonus from the date they committed themselves to staying in the Navy beyond their initial four-year enlistments. Although other preliminary requirements had to be met before the payment was actually made to the respondents, the specific sum to be received was that in effect on the date that the "Agreement to Extend Enlistment" was signed.

This interpretation by the court of appeals is consistent with the legislative intent that a specific sum be offered to the enlisted man when he was deciding whether to reenlist or extend enlistment. It also satisfies the primary objective of the VRB program established by the Department of Defense directives in that retention of those with "critical skills" and adequate manning levels of those skills was ensured when the respondents incurred their additional two-year obligation. Only after its interpretation of the statutes and regulations did the court of appeals "reinforce" its decision by application of the contractual principle that ambiguous contract terms are construed most strongly against the drafter.

Under the Government's interpretation of the legislation and regulations, the Navy could be certain that its "critical skills" were adequately manned while at the same time avoid paying the variable bonus to those who had assured this manning level.

Although the respondents became entitled to a bonus on the date of their extension agreements, respondent Johnson's situation is viewed differently by the Government because the VRB program was abolished by Congress prior to the time he completed his initial four years. However, legislative history indicates that it was not the

intent of Congress that those who had extended their enlistments prior to the effective date of the Bonus Revision Act would be denied their bonuses. Furthermore, even if this were the congressional design, the purpose of the Act was clearly to reduce government expenditures, and under the doctrine expressed in *Lynch v. United States*, 292 U.S. 571 (1934), Congress is "without power to reduce expenditures by abrogating contractual obligations of the United States." 292 U.S. at 580. Since all the respondents became obligated to serve an extended enlistment when they signed their extension agreements, they are entitled to receive the bonuses in effect on those dates.

ARGUMENT

WHEN THE RESPONDENTS AGREED TO SERVE AN ADDITIONAL TWO YEARS ON THEIR ENLISTMENT CONTRACT THEY ACQUIRED A CONTRACTUAL ENTITLEMENT TO RECEIVE THE VARIABLE REENLISTMENT BONUSES IN EFFECT AT THAT TIME.

A. RESPONDENTS' ENTITLEMENT TO RECEIVE THEIR VARIABLE REENLISTMENT BONUSES IS DEPENDENT UPON AN INTERPRETATION OF THE APPLICABLE STATUTES AND REGULATIONS.

The relationship between a serviceman and the military is not one grounded upon the normal standards of contract law. As the Supreme Court noted in *Bell v. United States*, 366 U.S. 393, 401 (1961), "[a] soldier's entitlement to pay is dependent upon statutory right." The Court in *Bell* ruled that the Government's termination of pay of disloyal Korean War prisoners was not proper, despite the Government's argument that the prisoners' actions resulted in a material breach of contract and that as a result they were not entitled to their pay. The Court held that "common-law rules

governing private contracts have no place in the area of military pay" *Id.* Similarly the issue in this case must be resolved not by a reference to contract principles but by an analysis of the applicable statutes and military regulations in effect at the time that the respondents agreed to extend their enlistments.[28] The key phrase to

[28]Each of the respondents agreed to extend their enlistments at a time when the multiple applicable to the CTM rate was four. As will be shown, the regulations required that this be the bonus paid to the respondents upon completion of their initial four-year enlistment. Respondent Johnson's situation is different in that prior to the completion of his first four-years, Congress passed the Bonus Revision Act of 1974, Pub. L. No. 93-277, 88 Stat. 119 (codified in 37 U.S.C. §§ 308, 308a (Supp. IV 1974)). In his case there is the additional factor of whether or not Congress intended to terminate his entitlement to the VRB and if so, whether they had the power to do this.

It must be noted, however, that of the three appeals court decisions and several district court decisions, there is no disagreement among the courts with the principle that the respondents were entitled to the VRB in effect at the time they extended their enlistment. The disagreement arises over whether or not Congress intended to and could subsequently abolish this entitlement by abolishing the VRB program. *See, e.g.*, Collins v. Rumsfield, 542 F.2d 1109, 1112 (9th Cir. 1976), *petition for cert. pending sub nom.* Saylors v. United States (No. 76-677); Carini v. United States, 528 F.2d 738 (4th Cir. 1975), *petition for cert. pending* (No. 75-1695); Caola v. United States, 404 F. Supp. 1101 (D. Conn. 1975).

In *Collins* the court held that Congress' power to abolish the VRB program precluded court intervention. 542 F.2d at 1110. However, no opinion was expressed on those individuals who began to serve their extensions prior to enactment of the Bonus Revision Act. *Id.* at 1112. Judge Haynsworth in *Carini* distinguished *Larionoff* by noting that the *Larionoff* district court had held that the bonus could not be deprived by an amendment to Navy regulations. He stated that a court "might reasonably hold the Navy bound by its representation," but that it could not "bind Congressional power in areas committed to Congressional discretion." 528 F.2d at 741 n.7. The Government also acknowledges this distinction. In their petition for rehearing in the court of

[footnote continued]

be construed in the enlistment contract is "in consideration of the pay, allowances, and benefits which will accrue to me during the continuance of my service." The Government has conceded that the term "pay" in the extension agreement includes the variable bonus (Pet. App. 18a n.23, 56a n.2), and the lower courts have concluded that the respondents were induced to extend their enlistments by the promise of a bonus (Pet. App. 10a, 73a). The legislative history of the statute (Act of August 21, 1965, Pub. L. No. 89-132, § 3, 79 Stat. 547, *as amended* 37 U.S.C. § 308 (Supp. IV 1974)) and the applicable military regulations must be examined to determine if the VRB to be paid was that in effect on the date the extension agreement was signed or that effective on the date when the enlisted man began to serve his extension.

This was precisely the approach taken by the court of appeals. Contrary to the Government's contention that the court's "opening premise" was the contract rule that an agreement will be construe[d] most strongly against the Government, as . . . [the] drafter" (Pet. Brief 20, *quoting* Pet. App. 25a), the court of appeals made it clear that its decision was an interpretation of the applicable regulations as mandated by *Bell* (Pet. App. 10a n.15). Only after it had found the Government's construction of the Navy regulations to be contrary to congressional

appeals in *Larionoff*, they sought rehearing only on the issue of those individuals who became eligible for payment after the Bonus Revision Act of 1974 (Pet.App. 55a). Every district court to decide the issue of whether or not Congress could abolish the variable bonus program has held that they could not. *See, e.g.*, Caola v. United States, 404 F. Supp. 1101 (D. Conn. 1975); Collins v. Schlesinger, Civil No. 75-0053 (D. Hawaii May 20, 1975), *rev'd sub nom.*, Collins v. Rumsfield, 542 F.2d 1109 (9th Cir. 1976); Carini v. United States, Civil No. 74-88-N (E.D. Va. Jan. 7, 1975), *rev'd*, 528 F.2d 738 (4th Cir. 1975). For a complete listing of suits brought by or on behalf of individuals denied their VRB payments see Pet. App. 18-19 n.20.

intent, did the court "reinforce" its opinion with the contracts rule discussed above.[29]

Having established that the proper method of determining the bonus due the respondents is by an interpretation of the relevant legislative history and military regulations, it now becomes necessary to examine these documents.

[29]The court of appeals appears to have used this contract principle to refute any argument that the regulations interpreted were ambiguous, and, therefore, subject to a different interpretation. Corbin states that "after applying all the ordinary processes of interpretation, including all existing usages, general, local, technical, and the custom and agreement of the two parties with each other . . . ," if there is still doubt as to the meaning, the court will adopt the meaning which is less favorable to the draftee. 3 *Corbin on Contracts* §559 (1960).

Thus if the terms of the military regulations were ambiguous in light of the Congressional intent, which the court held they were not (Pet. App. 25a), they would be construed against the Government. Despite the fact that *Bell* states that common law contract principles are not applicable in the area of military pay, the relationship between a serviceman and the military still must be characterized as "contractual" in nature. The Government concedes this, and even argues that the contract principles applied by the court of appeals are not the correct contract principles (Pet. Brief 20-21). Furthermore, even though a member of the military has a changed "status," he retains the right to receive the benefit of the bargain in a dispute over his enlistment contract. *See* Peavy v. Warner, 493 F.2d 748, 750 (5th Cir. 1974).

B. UNDER THE APPLICABLE LEGISLATION AND MILITARY REGULATIONS, THE RESPONDENTS ARE ENTITLED TO THE VARIABLE REENLISTMENT BONUSES IN EFFECT ON THE DATE OF THEIR EXTENSION AGREEMENTS.

1. It was the intent of Congress in establishing the VRB program that an enlisted man should be paid the specific sum in effect at the time he makes the decision to extend his enlistment.

The payment of reenlistment bonuses to members of the armed services is a practice that has existed since 1795.[30] In 1954 Congress enacted provisions for payment of what came to be known as the Regular Reenlistment Bonus (Act of July 16, 1954, Pub. L. No. 83-506, § 2, 68 Stat. 488). This bonus consisted of the monthly basic pay of the individual at the time of his reenlistment, multiplied by the number of years for which he reenlisted. As a retention tool, however, this inducement was not very successful, and it became apparent to Congress that it was losing great numbers of the highly trained and qualified military personnel needed to operate its increasingly complex equipment. The military services were unable to offer these individuals any more than the standard reenlistment bonus. As a direct result of this problem Congress created the variable reenlistment bonus. The basic economic logic of the VRB program made sense. It was less costly to pay a bonus to induce a skilled technician to remain in the military than to completely train another individual; or in the words of Representative Bennett during House debate on the bill: "It is just plain good personnel planning to provide a $4,000 bonus to encourage reenlistment rather than pay $10,000 to train a replacement." 111 Cong. Rec. 17206

[30]See Pet. App. 11a-12a n.16 for a listing of previous legislative treatment of reenlistment bonuses.

(1965). Department of Defense testimony before the House of Representatives indicated that in certain critically undermanned skills, whenever an individual left the service after his first term, it cost the service $10,000 in addition to a reduction of operational capabilities. H.R. Rep. No. 549, 89th Cong., 1st Sess. 47 (1965).

The bonus was aimed at those individuals on whom Congress felt it would have the most impact. An examination of retention trends over the six years prior to the passage of the Act indicated that reenlistments after the first term were in excess of 85 percent, while reenlistments for those completing their first term were normally below 25 per cent. S. Rep. No. 544, 89th Cong., 1st Sess. 18 (1965), *reprinted in* [1965] U.S. Code Cong. & Ad. News 2745, 2748. Therefore, it was the intent of Congress, upon the advice of the Defense Department, to "concentrate retention money at the reenlistment decision point, thereby getting the most drawing power per retention dollar." *Id., reprinted in* [1965] U.S. Cong. Code & Ad. News at 2757. While the bonus paid to individuals was designed to be flexible so that it could be adjusted as certain skill requirements changed, it was the intent of Congress to authorize the offering of a specific multiple of the regular reenlistment bonus at that point when an enlisted man was deciding whether or not to remain in the military beyond his initial four-year enlistment. See 111 Cong. Rec. 17201 (1965) (remarks of Rep. Nedzi).

It is the Government's contention that Congress was interested in only offering the VRB to the reenlistee (Pet. Brief 38). There are two fundamental faults with this argument. First, as is evidenced by the language of the congressional reports; Congress' goal was retaining those individuals who had acquired certain critical skills. In order to retain them, it intended that the VRB be offered

at the decision making point. In the case of the respondents, this point was when they were deciding whether or not to extend their enlistments.[31] If these men became obligated to serve beyond their initial four-year term of enlistment, the congressional goal in enacting the VRB program was met, and the congressional design was, therefore, that they be entitled to receive the VRB in effect at the time they agreed to extend.[32] Any other interpretation would be inconsistent with the Defense Department's recommendation and Congress' desire that the bonus be offered at the critical "decision point."

Second, even if Congress intended that the bonus be offered only to those who reenlisted and not all those who agreed to serve beyond four years, 37 U.S.C. §906 provides that "[a] member of the ... Navy ... who extends his enlistment .... is entitled to the same pay and allowances as though he had reenlisted." Therefore, it is clear that the decision to extend should be treated

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[31]In fact, this was the only possible "decision point" for the respondents if they wished to enroll in the AEF program. As the government notes in its brief, there were several (44 of 62) critical rates which could have been attained by persons serving only four years (Pet. Brief 32-33). Enlisted men in these rates would not have to decide on reenlistment or extension until at or near the end of their enlistment. Respondents were not in such a position. To enter the AEF program they were required to make an extension decision early in their enlistment. This was the only time such decision could be made by them.

[32]The Navy's interpretation would also defeat congressional intent if the reverse situation to the one involved here were presented. If for example, an enlisted man agreed to extend his enlistment at a time when the VRB multiple was two, but by the time his initial enlistment expired that multiple had risen to four, the Navy would award a bonus of four times the RRB. Thus, legislative design that the bonus be the incentive is destroyed if there is no certainty to that bonus.

identical to the decision to reenlist, and Congress intended to offer the serviceman a specific bonus at the time such decision was made.

Congress did, however, delegate the implementation and administration of the VRB program to the Secretary of Defense. Therefore, an examination of Department of Defense directives concerning the program is essential to a determination of when entitlement to the bonus arose. Such an examination further reveals that the Navy's interpretation is incorrect.

> *2. Under the pertinent Department of Defense Directives and Instructions, the respondents were eligible to receive the variable reenlistment bonuses in effect on the dates of their extension agreements.*

It is the Navy's view that under the pertinent regulations, an enlisted man's entitlement to a variable bonus attaches on the day he begins to serve either his reenlistment or extension of enlistment (Pet. Brief 26). The Government correctly notes that in examining an administrative regulation "controlling weight" is to be given to the administrative interpretation. (Pet. Brief 26-27, *quoting Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1944)). There are two provisos to this rule, however. First, the legislative intent is often relevant if the words used in the regulation are in doubt. Second, administrative interpretation will be disregarded where it is "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock Co., supra,* at 414. Congressional intent has already been examined and shown to be at odds with the Navy's interpretation. This interpretation also "undermine[s] the explicit language of . . . the appropriate regulations." (Pet. App. 22a).[33]

The directive and instruction issued by the Department of Defense subsequent to the passage of the VRB statute echo Congress' view that the primary objective in enacting the legislation was to retain those highly trained individuals with certain critical skills beyond their initial four-year enlistment. DOD Directive 1304.14, para. A.1. (Sept. 3, 1970) (App. 40). The variable bonus was to assist in "attaining and sustaining adequate career manning levels in designated military specialties" *id.*, and this goal was to be achieved through the use of the VRB as the "principle monetary incentive . . ." *Id.* para. C.1 (App. 41).

The main criteria to be examined in deciding whether a particular rate warranted the bonus was the projected manning shortages in that rate. These shortages were to be evaluated "in light of the training investment required in the military specialty." *Id.* para. IV.D.1. (App. 43).[34]

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[33]Bowles v. Seminole Rock Co. also involves a substantially different fact pattern than that presented here. In *Seminole Rock Co.*, a case involving maximum price regulation during World War II, the Administrator of the Office of Price Administration had published bulletins concurrently with the regulations and made "countless explanations and interpretations . . . to inquirers affected by [the regulation]." *Id.* at 417-18. In cases where *Seminole Rock Co.* has been followed, the administrative interpretations have been similarly consistent with congressional intent and have clearly been made a matter of public record by administrative rulings or bulletins. *See, e.g.*, Udall v. Tallman, 380 U.S. 1 (1964). However, where an administrative interpretation of a regulation has been unreasonable or inconsistent with its purpose, it has not been followed. Brennan v. Occupational Safety & Health Review Comm., 491 F.2d 1340, 1344 (2d Cir. 1974)

[34]"Training investment" is defined as:

> A quantitative index based on the length and cost of formal training required to qualify first term personnel in

[footnote continued]

It is obvious, therefore, that in light of the extensive training required for those in the CTM rate, an interpretation that the respondents became entitled to receive the VRB in effect when they agreed to serve an additional two years meets the criteria and established goals set by the Defense Department. Furthermore, the Secretary of Defense directed the Secretaries of the respective services to conduct an extensive publicity campaign on the VRB program. *Id.* para. V.A.5 (App. 51). Following this directive, the Navy required that prospective reenlistees be advised at their decision making point of the "[a]dvantages of early reenlistment to obtain present amount of VRB vice uncertainty of future value of the VRB." Navy BUPERS Inst. 1133.18B, para. 8.a. (December 19, 1968) (App. 99-100). Although this requirement applied to the Navy's reenlistment interview, the intent was obvious—get the enlisted man to obligate himself beyond that initial four-year enlistment and use the VRB as the incentive.

With the underlying objectives of the VRB program in mind, it becomes necessary to scrutinize those portions of the regulations pertaining to the reduction or termination of the variable bonus. DOD Instruction 1304.15, para. VI.A. (Sept. 9, 1970) states: "Members serving in a military specialty designated for reduction or termination of award . . . will receive *the award effective on the date of their reenlistment or extension of enlistment*, except as provided in paragraph V.B.1.f. above" (emphasis added). It is the Government's conten-

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a military specialty. The index for a military specialty establishes its relative position in an array of all military specialities in the Military Service concerned, with the military specialty requiring the longest and most costly training having the highest index.

DOD Directive 1304.14, para. III.L. (Sept. 3, 1970).

tion that the date of extension of enlistment is the date on which an enlisted member begins to serve his extension (Pet. Brief 28-29). In support of this they point to the fact that the reenlistee receives the bonus in effect on the date he begins to serve his reenlistment. This is true. However, the date the reenlistee begins to serve his reenlistment is also the day he agrees to serve beyond his initial enlistment. Thus the entitlement to the bonus is concurrent with the obligation of additional service. It would seem only logical as the court of appeals ruled, that "once someone agrees to perform certain services in exchange for a given sum of money, and the Government has received that performance—or, *as in this case insists on receiving it . . .*" a "contractual right" arises (Pet. App. at 59a, *citing Butler v. Pennsylvania*, 116 U.S. (10 How.) 131, 133-34 (1885) (emphasis in original)).[35] This logic is more persuasive in this instance where the respondents became bound to an additional two years when they signed their extension agreements. Under the regulations, it is immaterial that the reenlistee became entitled to the bonus in effect on the day he began to serve his reenlistment. The important factor is that he received the VRB in effect at the time he made the *decision* to reenlist. This construction is entirely consistent with legislative desire to offer the VRB at the "decision making" point, and would give the respondents an entitlement to the bonus in effect when they agreed to extend.

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[35]The Government refutes this holding of the court of appeals by contending that Congress did not intend a specific sum be paid in the bonus (Pet. Brief 25 n.35). However, under Bell v. United States, *supra*, military pay is subject to statutory control; and just as Congress has the power to change certain aspects of military pay, they also have the power to mandate that a specific bonus be offered and paid to those serving beyond their initial enlistments. As discussed earlier, this was the congressional intent in enacting the statute (see p. 20 *supra*.).

Under a proper interpretation of the DOD instruction, the date when an enlisted member began to serve his reenlistment or extension was important for only one reason—that was the date he became eligible for actual payment of his bonus. Navy BUPERS Instruction 1133.18B, para. 6 (December 19, 1968) (App. 97) lists those requirements that had to be met before an enlisted man would be paid his bonus. It is not the contention of the respondents that they would have been entitled to payment of the VRB had they not met these requirements. Rather, they were entitled to receive that payment in effect when they obligated themselves for an additional two years once they met these other requirements. In fact, the only time at which they could meet all these other requirements was at the conclusion of their initial enlistment.[36]

Another argument offered by the Government as to why entitlement to an award did not accrue until the beginning of an extension period is that the section on the extension agreement which contained the amount of the bonus to be paid was not filled in until the extension began (Pet. Brief 29-30). The reason for this is obvious upon an examination of the form. The mileage allowance and lump sum leave portions of the form would not be known and therefore could not be filled in until the end of the initial four-year enlistment. Furthermore, the complete uselessness of this form as evidence of a prior agreement was demonstrated in respondent White's case. When he refused to sign it, he was told that his extension would be put into effect based upon the agreement to extend that he had signed four years earlier. The form

[36]The court of appeals also noted that it was not eliminating these requirements but only holding that once the other requirements were met, the VRB paid would be that in effect when the extension of agreement was signed. (Pet. App. 22a n.27).

was useful, therefore, only as an indication of the mileage allowance and unused leave for which the enlisted man would be compensated.

However, assuming arguendo that the "award effective on the date of extension of enlistment" in DOD Instruction 1304.15 is that award in effect on the date that the enlisted man begins to serve his extension, the proviso to para. VI.A., para. V.B.I.f., offers an alternative rationale to support the respondents' position. DOD Instruction 1304.15, para. V.B.1.f. (App. 61) provides that a member is eligible to receive the award if he

> Attains eligibility prior to the effective date of termination of awards in any military specialty designated for termination of the award. Member must attain eligibility prior to the effective date of a reduction of award level to be eligible for the higher award level. *Eligibility attained through any modification of an existing service obligation,* including any early discharge granted pursuant to 10 U.S.C. 1171, must have been attained prior to the date the authority approving the modification was notified of the prospective termination or reduction of award in the military specialty.

(Emphasis added). The applicable Navy regulation defines an extension of enlistment as just such a modification of a service obligation. Navy BUPERS Instruction 1133.18E, para. 7.h. (March 23, 1972) (App. 115-16). Therefore, when the respondents modified their service obligations through their extension agreements they became entitled to receive the VRB in effect at that time.[37]

[37]In addition to this requirement, DOD Instruction 1304.15, para. V.B.1. lists the other conditions which must be met prior to payment of the bonus. Those conditions are virtually identical to those in Navy BUPERS Instructions 1133.18B, para. 6 (Dec. 19, 1968)

(See p. 7 *supra*.)

The Government chooses to interpret this section as being applicable in the "situation in which a service member could both agree to extend his enlistment and begin serving the extension during the 90-day period between the receipt of notice of a prospective reduction or termination of the VRB award for a particular skill and the effective date of such change" (Pet. Brief 32). Such a situation might not be "rare or unusual" (*id.*), but those entitled to the award under such an analysis of the regulation would be small in comparison with those in the respondents' status. Furthermore, this interpretation hardly comports with the legislative intent to offer the bonus at the point when a decision on extending must be made.

Although throughout this case the Government has denied that the respondents became entitled to a bonus effective the date they incurred an additional two-year obligation, there is other evidence that the Navy felt that it did in fact owe such an obligation to the respondents. The Joint Conference Report on the Bonus Revision Act reveals that when the House Armed Services Committee indicated that selective reenlistment bonuses would not be authorized for personnel for existing obligated service "[t]he Navy expressed great concern that the language of the bill might be interpreted to require it to abrogate an understanding it had with enlistees and would operate in such a way as to cause serious retention problems in its most critical career field." H.R. Conf. Rep. No. 985, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News, 2998, 3000. The Navy was primarily concerned with those personnel in their nuclear power field. Congress, in an attempt to encourage longer reenlistments or extensions, made the SRB substantially larger than the VRB. The Navy's concern was that those who had existing obligated service under the VRB program, might be locked into accepting the variable

bonus and not be able to extend for a longer period of time and thus receive the SRB. The resulting discontent would damage reenlistments in the "often critical reenlistment period" at the six to ten year time frame. *Id.*[38] One thing is clear, however: The Navy felt that it was committed to the payment of the variable bonus to those who had extended their enlistments on the inducement of the VRB.[39]

The Government's interpretation of legislative intent and the military regulations leaves the enlisted men in the respondents' position "hedging his bet" at his decision making point. He is forced to decide whether to stay in the Navy beyond his initial term not knowing if the then existing VRB will continue. If he extends and the VRB multiple remains high, he wins; if it is reduced or abolished, he loses. In either case, it is not the career incentive that Congress or the Defense Department intended it to be. The obligation to serve an additional two years was incurred by the respondents "in considera-

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[38]Congress alleviated this problem by giving the person who had extended under the VRB program the option of cancelling his prior extension, and his right to receive the VRB, and reenlisting for a period of "at least two years beyond the cancelled extension." H.R. Conf. Rep. No. 985, 93d Cong., 2d Sess. 4 (1974).

[39]In Collins v. Rumsfield, 542 F.2d 1109 (9th Cir. 1976), *petition for cert. pending sub nom.* Saylors v. United States (No. 76-677), Judge Sneed reached the opposite conclusion. He felt that the Navy's concern was "completely at odds with the notion that the enlistees about whom the Navy was concerned already had accrued rights to VRB's." *Id.* at 1111. Judge Sneed gives no reason for this statement, but it is hard to imagine what obligation the Navy was concerned about if not the obligation to pay bonuses to those who had extended their enlistments under the inducement of receiving the bonuses. The Navy had justifiable reason to be concerned that if Congress forced those in the critical nuclear power area to accept the VRB they had extended for, rather than allow them to increase their extensions and receive the SRB, many of these people would not reenlist at the six-year juncture.

tion of pay, allowances, and benefits which will accrue . . . during the continuance of service . . . ." (see p. 3 *supra*). The VRB was part of this pay, and it was intended that a specific VRB be offered the respondents when they were deciding whether or not to enter the AEF program. Any other interpretation of the variable bonus program would destroy the effectiveness of the award as a career inducement.[40] Had the Navy wished to limit the VRB payment to that in effect on the date an enlisted member began to serve his extension, they could have, as both the lower courts suggested (Pet. App. 24a, 75a), provided in the extension agreement that the variable bonus was subject to change.[41] Under the Navy's interpretation, they have the benefit of offering the award as an inducement, binding the enlisted man to an additional two years service and thereby ensuring that their critical rates will be adequately manned, and then avoiding payment of the bonus by terminating it at some point prior to the end of the initial four-year enlistment.[42]

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[40]It has been suggested by the Government that the respondents extended their enlistment obligation to qualify for entry into the Navy's AEF program. (Pet. Brief 35). Training in the AEF field may have been the "reason for extension," but clearly part of the consideration for extending, and as the lower courts found an inducement to extend, was the variable bonus.

[41]As the court of appeals noted, such a provision would have undoubtedly led to fewer extensions (Pet. App. 24a).

[42]Speaking of this interpretation, the court of appeals said that it had "the potential of producing serious inequities.

. . . .

[A]ppellants, by extending their enlistments at a time when the VRB award was at a multiple of four, may have contributed to the very satisfaction of Navy personnel requirements that led to termination of the VRB for the CTM rating." (Pet. App. 26a-27a n.32).

C. RESPONDENT JOHNSON BECAME ENTITLED TO RECEIVE THAT VARIABLE REENLISTMENT BONUS EFFECTIVE THE DATE HE EXTENDED HIS ENLISTMENT, AND CONGRESS NEITHER INTENDED TO NOR HAD THE POWER TO ABOLISH HIS RIGHT TO RECEIVE THE BONUS.

Although respondent Johnson extended his enlistment in consideration of the same "pay, allowances, and benefits" as the other respondents, his situation differs from the others in that prior to the time he began to serve his extension Congress passed the Bonus Revision Act of 1974. For reasons previously discussed, respondent Johnson became entitled to receive the VRB in effect on the date he extended his enlistment. The only disagreement among the courts on the entire VRB issue has been over whether Congress intended to or had the power to abolish the VRB entitlements of respondent Johnson and those similarly situated. (see pp. 16-17 n.28 *supra*).

The selective reenlistment bonus was created by Congress in an attempt to ensure that members in certain critical rates would receive a substantial incentive to reenlist at the "six to ten years of service time frame." H.R. Conf. Rep. No. 985, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 2998, 2999. The bonus was also available to those who reenlisted or agreed to extend after their first enlistment, provided that the enlisted member extended his service for at least three years. 37 U.S.C. § 308(a) (Pet. App. 86a). The SRB was designed to combine "the most desirable features of the Regular Enlistment and Variable Enlistment Bonuses," H.R. Rep. No. 985, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News at 2993, and as a result the VRB program was terminated effective June 1, 1974. However, the Bonus Revision Act contains no provision prohibiting payment of bonuses after June 1, 1974 that were "contracted" for prior to June 1, 1974. The Joint Conference did state

that it did not "expect bonuses to be paid for services for which there was an existing obligation," (*id.* at 3000), but a review of the Conference Report clearly indicates that the "bonus" of which the members were speaking was the SRB. Therefore, if an enlisted member had agreed to extend prior to June 1, 1974, he would not be entitled to receive an SRB at the end of his first four-years. Congress gave him the opportunity to cancel his extension and reenlist for a period at least two years greater than the cancelled extension *(id.)*, but there is nothing in the Act to suggest that his entitlement to the variable bonus was in any way impaired. This interpretation of congressional intent is reinforced by the fact that the House version of the bill contained a multiple bonus restriction which was not adopted in the Conference Report (*id.* at 2999). Under this restriction a member would not have been allowed to receive total reenlistment bonuses for two or more reenlistments in excess of that bonus he would have received for one long reenlistment equal in length to the shorter reenlistments. Thus the individual in respondent Johnson's position had one of three choices (assuming his rate was SRB eligible): First, he could collect his VRB, serve his additional two years and be discharged; second, collect his VRB, serve his two years, and then reenlist under the SRB program; or third, cancel his extension and reenlist for a period at least two years greater than his extension and thereby obtain a larger SRB. Nowhere, however, is there any intent of the Congress to eliminate the first option.

Assuming arguendo that Congress did intend to retroactively abolish respondent Johnson's VRB entitlement when it eliminated the program, they did not possess the power to do so. Congress does have broad power under the Constitution pursuant to the "War Powers" clause. U.S. Const. art. I, §8. In providing and maintaining a Navy, the legislature has the power to

retroactively modify certain terms of the enlistment contract. *See, e.g., Selective Draft Law Cases,* 245 U.S. 366 (1918) (extending the period of military service during the war for those in the military service); *Schultz v. Clifford,* 303 F. Supp. 963 (D. Minn. 1968) (enlarging the length of time for which reserves could be called up for active duty). However, just as clearly, Congress does not have the power to "reduce expenditures by abrogating contractual obligations of the United States." *Lynch v. United States,* 292 U.S. 571, 580 (1934). As discussed above, when respondent Johnson obligated himself to serve an additional two years, he obtained a "contractual" right protected by the fifth amendment to receive the VRB in effect at that time.[43] The issue then is whether Congress passed the Bonus Revision Act under the provisions of the War Powers clause or whether it was passed as a cost-cutting measure. The stated purpose of the bill was "to provide authority to grant enlistment and reenlistment bonuses to enlisted personnel on a selective basis to fill critical and short skill requirements in the armed services in an all-volunteer environment." H.R. Rep. No. 857, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News at 2984. This expressed purpose may appear, at first glance, to put the Act within the ambit of the War Powers clause.[44]

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[43] In the Court of Appeals the Government maintained that payment of the VRB was a mere "gratuity," and, analogous to social security payments and other government gratuities, it could be altered or terminated at any time. The court, however, held that once the respondent became bound to serve an additional two years the "gratuity" became a contractual right. (Pet. App. 56a-60a).

[44] There is what must be considered great irony in the legislative history of the Bonus Revision Act of 1974. *Larionoff* was decided by the district court on September 28, 1973. In amazingly rapid fashion the Senate Report on the Act was issued

[footnote continued]

However, throughout the entire legislative history the recurrent theme of reducing expenditures predominates. The House Report repeatedly talks of how the bill would result in "a significant savings in the future," represents an "opportunity to save money," and "would be a budgetary reduction in reenlistment costs." [1974] U.S. Code Cong. & Ad. News at 2986, 2990, 2993. Also Congress believed that the Act would put tighter controls on the services' unwarranted payment of incentive bonuses and thereby improve "management of reenlistment incentives" (*id.* at 2988-89). Clearly then the legislative purpose in enacting the 1974 Act was to reduce the cost of reenlistment bonuses. Under the holding of *Lynch v. United States, supra,* Congress does not possess the power to terminate VRB entitlement for such a purpose. Therefore, respondent Johnson's entitlement to receive his VRB is unaffected by the Bonus Revision Act.

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on December 19, 1973, the House Report on March 1, 1974 and the Conference Report on April 10, 1974. The Act, with a stated purpose that could possibly preclude future Larionoff's from recovering their VRB's, was passed on April 23 and 24, 1974 by the Senate and House respectively. Certainly if there ever existed the opportunity to tailor make legislative history to avoid future governmental liability, this was the case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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